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No. 73-527

In the Supreme Court of the United States

OCTOBER TERM, 1973

LUCIO CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges the jurisdiction and venue of the trial court over the crime charged. He also claims that a co-defendant's guilty plea should have resulted in the termination of petitioner's trial as requested, that he was denied his right to cross-examination, and that the evidence was insufficient to sustain his conviction.

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiracy to possess with intent to distribute and to distribute heroin hydrochloride, in violation of 21 U.S.C. 841(a)(l) and 846. He was sentenced to a term of fifteen years' imprisonment and an additional special parole term of three years.[1]

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[1]The one count involving petitioner was the first of a seven-count indictment also involving Antonio V. Enriquez, Thomas D. Salinas, Felix Garcia Benevides, Jose Ynostrosa and Arlene Salinas, all

The court of appeals summarily affirmed (Pet. App. 18), and a petition for rehearing was denied on July 23, 1973 (Pet. App. 19). The time for filing a petition for certiorari was extended by order of Mr. Justice Powell until September 21, 1973, but the petition was not filed until September 22, 1973, and is thus untimely.

In May 1972, co-defendant Thomas Salinas, who had known petitioner for about eight years, met with petitioner in San Antonio, Texas, to arrange to purchase heroin (A. 364, 395-396).[2] Salinas testified that while he was at the home of co-defendant Antonio Enriquez, petitioner arrived with one Veto (A. 438, 485-486). Petitioner brought a spare tire from the trunk of his car into the den of Enriquez's home (A. 397-398, 487). Enriquez cut the tire open with a big hunting knife and removed a paper sack containing about two and a half pounds of heroin and a similar quantity of cocaine (A. 396-397, 439-440).

The heroin and cocaine were in plastic bags, wrapped in newspaper (A. 439-440). Petitioner and Enriquez took the heroin and cocaine into the kitchen to use the blender (A. 441, 446-447). Enriquez instructed Salinas "to go up to the front window to watch to see that nobody came to the house" (A. 441). Petitioner was heard by Salinas to "state that the cocaine was not as good as the other they had before" (A. 442). Petitioner then asked Salinas if he would like to try some and gave Salinas

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of whom were named as co-conspirators in count one and all of whom but Arlene Salinas were named as defendants in that count. Each was also charged with one or more substantive counts alleging distribution of heroin hydrochloride, in violation of 21 U.S.C. 841(a)(1). Due to severances and pleas, the case went to the jury only as to petitioner.

[2]"A." designates the appendix in the court of appeals, which includes a copy of the transcript of the trial. A copy of the appendix is being lodged with the Clerk of this Court.

some cocaine to test (A. 399, 442). Petitioner and Enriquez then packaged some of the heroin and gave it to Salinas first so that he could go to Fort Worth (A. 401-402, 451). Salinas received six ounces of heroin, brought it to Fort Worth, and sold it to a federal agent (A. 402, 451).

About two weeks later, Salinas called Enriquez from Fort Worth to arrange another sale, and Enriquez went from San Antonio to Fort Worth, where, on June 1, 1972, he met with Salinas and delivered some heroin (A. 389-395).

During one of Salinas' trips to San Antonio, when he was short of money, petitioner asked him if he wanted to do something to make more money (A. 442). Petitioner told Salinas that "he had some people in Laredo that needed to be taken care of" (A. 442). Enriquez told Salinas that he and petitioner were partners and "had a good connection" (A. 481-482).

Arlene Salinas accompanied her husband to San Antonio on a number of occasions (A. 453, 591). In March 1972 she accompanied him to the Enriquez home and there saw Thomas Salinas, Enriquez and petitioner in the dining room, where they were opening plastic bags, putting the contents into a blender, and measuring out the heroin in a spoon (A. 568-574, 608).

Petitioner did not testify and presented no witnesses.

1. Petitioner's contention that the evidence was insufficient to support his conviction is without merit. Testimony of an accomplice is a sufficient basis for a conviction if not incredible on its face. See *United States* v. *Strauss*, 443 F. 2d 986, 991 (C.A. 1), certiorari denied, 404 U.S. 851.

2. Petitioner contends that the trial court lacked the requisite jurisdiction and venue (Pet. 11-12). But it is well established that prosecutions in conspiracy cases may be maintained either in the district in which the conspiracy was entered into or in any district in which an act was done to effectuate the object of the conspiracy. See 18 U.S.C. 3237(a); *Hyde* v. *Shine*, 199 U.S. 62, 76-77; *Gayon* v. *McCarthy*, 252 U.S. 171, 177. The indictment charged, *inter alia*, that as part of the conspiracy one or more of the defendants would travel from Fort Worth to San Antonio to acquire heroin from one or more of the other defendants and thereafter cause it to be transported to Fort Worth for distribution to persons there. Among the overt acts specified were Salinas' call to Enriquez and their meeting in Fort Worth on June 1, 1972. There is sufficient evidence of the participation of petitioner's co-defendants in acts in furtherance of the conspiracy in the Northern District of Texas.[3]

3. Petitioner contends that it was reversible error for the trial judge to fail to grant petitioner's motion for mistrial subsequent to the guilty plea entered by co-defendant Antonio Enriquyz (Pet. 12-13). At the beginning of the second day of trial, out of the presence of the jury (A. 406-407), Enriquez changed his plea to guilty (A. 406-419). Petitioner then moved for a mistrial, but the motion was denied and the trial resumed (A. 421-424). There is nothing in the record to indicate that the jury ever knew that Enriquez's withdrawal from the

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[3]Transfer of petitioner's case from the Fort Worth Division to the Abilene Division, both being within the Northern District of Texas, has no significance for venue or jurisdictional purposes. *Bostick* v. *United States*, 400 F. 2d 449, 452 (C.A. 5), certiorari denied, 393 U.S. 1068.

trial was the result of the entry of a guilty plea. Moreover, in his charge, the judge instructed the jury as follows (A. 850-851):

> The only question before you in this case is the issue of the guilt or innocence of the defendant, Lucio Castro. What has happened to any of the other defendants or what may happen to them is not material to the issues in this case except insofar as it may bear on the credibility of a codefendant who is testifying as a witness. You should decide the question of the guilt or innocence of Mr. Castro on the basis of the facts—the evidence that you have heard here in this case without regard to the guilt or innocence of any other defendant. In other words, each defendant's guilt has to be proved by evidence beyond a reasonable doubt without regard to whether any or all of the other defendants are guilty.

In these circumstances, no error was committed when the trial judge refused to grant petitioner's motion for a mistrial.

4. Petitioner's contention that he was improperly denied the right fully to cross-examine witness Thomas Salinas (Pet. 7-11) is insubstantial. After the government's direct examination of Thomas Salinas, he was extensively cross-examined by petitioner (A. 467-551). At the close of the government's case, petitioner's counsel asked if he could recall Salinas. The trial judge thereupon stated that "[y]ou can recall him and continue cross-examination of him" (A. 789). Petitioner's counsel then presented motions out of the presence of the jury (A. 790-799) and rested his case without calling any witnesses (A. 796, 800). The judge, with the express consent of petitioner's counsel, then excused all the witnesses (A. 800).

It was during the government's closing argument that petitioner's counsel first claimed that petitioner had been denied the right to cross-examine Salinas further. The following colloquy then took place between petitioner's counsel (Mr. Leon) and the court (A. 839-840):

MR. LEON: * * * I asked to have Mr. Salinas for further cross examination, asked permission to further cross examine Salinas prior to the time the government rested and I was denied that by the Court. * * *

THE COURT: Well, I told you then that you could recall him for further cross examination.

MR. LEON: But you told me I had to recall him on my case and they could go ahead and rest. I wanted to recall him for further cross examination on their case, because he was their witness.

THE COURT: I do not see where it makes any difference.

These facts of record fully answer the claim of denial of cross-examination.[4]

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[4]Petitioner's contention that he was denied the right to cross-examine Salinas subsequent to the furnishing of certain Jencks Act material to him by the government (Pet. 8) is unsupported by the record. At the time the three letters mentioned in the petition (Pet. 8) were furnished to petitioner, he was assured by the court that he could cross-examine Salinas further (A. 677-678). Petitioner, however, never took advantage of that opportunity.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

DOJ-1973-12